

LINDA LINGLE  
GOVERNOR OF HAWAII



STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
**COMMISSION ON WATER RESOURCE MANAGEMENT**  
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DEPUTY DIRECTOR

STAFF SUBMITTAL

for the meeting of the  
COMMISSION ON WATER RESOURCE MANAGEMENT

July 16, 2008  
Honolulu, Hawaii

Application for an After-the-Fact Stream Diversion Works Permit (SDWP.1873.6)  
For a Four-Inch Diameter PVC Pipe in Niulii Stream  
North Kohala, Hawaii, TMK: (3) 5-2-008:001

APPLICANT:

Mr. Ralph Galan  
P.O. Box 145  
Kapaau, HI 96755

LANDOWNER:

Roy and Phoebe Thompson  
P.O. Box 7001  
Hilo, HI 96720

SUMMARY OF REQUEST:

Application for an after-the-fact Stream Diversion Works Permit (SDWP.1873.6) for a four-inch diameter PVC pipe to replace a storm-damaged auwai in Niulii Stream, North Kohala, Hawaii, TMK: (3) 5-2-008:001.

LOCATION: Exhibits 1a and 1b.

BACKGROUND:

In 1989, the applicant filed a Registration of Stream Diversion Works and Declaration of Water Use for Waikane (Niulii) Stream to irrigate 1.6 acres of taro. In April 1990, the Commission declared that the applicant's Registration was incomplete because he did not include a location map. In February 1991, the Commission sent a final request for information to the applicant, and in March 1991, the applicant submitted maps and drawings showing the location of his taro loi on Niulii Stream. In April 1991, the Native Hawaiian Advisory Council sent a letter to the Commission on behalf of the applicant that included a map showing the location of his auwai and the areas of use and stated that water was not used for domestic purposes at that time; however, the Council reserved the right to use water for domestic purposes at a future time.

The applicant has a series of up to ten continuous loi (approximately 3,200 square feet) on kuleana land that is owned by the applicant's sister, Phoebe Thompson. The number of active loi depends on the

amount of water that is available from the auwai previously and from the PVC pipe presently. The applicant has five active taro loi currently (See Exhibit 3).

In January 2008, a flash flood in Niulii Stream destroyed a portion of the auwai that was used to deliver water to the applicant's taro loi and washed away sixty feet of the auwai. According to the applicant, the dirt and stone auwai was approximately two and a half feet wide with about six inches of water flowing in the auwai before it was damaged by the flash flood. The applicant wanted to restore water back to his loi as soon as possible. Consequently, the applicant installed approximately 60 feet of four-inch diameter PVC pipe along the bank of Niulii Stream where the auwai used to be located. Water in the four-inch pipe flows by gravity into each active loi via a 1 ¼-inch pipe with a shut-off valve, and an outlet pipe in each loi returns the water back to the stream.

On February 10, 2008, the applicant submitted a request for a permit to lay a four-inch diameter pipe to restore water back to his loi. On February 27, 2008, the Commission sent a letter to the applicant requesting additional information on the land ownership and location of the auwai and four-inch pipe. On March 26, 2008, the applicant submitted the requested information to the Commission.

#### DESCRIPTION:

The applicant installed approximately 60 feet of four-inch diameter PVC pipe along the bank of Niulii Stream to replace the auwai that he had been using previously to deliver water to his taro loi and that had been destroyed and washed away by a flash flood in January 2008.

#### ANALYSIS:

##### Agency Reviews

The Office of Hawaiian Affairs (OHA) supported the applicant's permit application and commented that the PVC outlet pipe, as depicted in the application, extends over to the middle of the stream and may be subject to breakage during heavy storm events. OHA requested reconfiguration of the pipe so it is more pleasing aesthetically and less fragile.

The Land Division made the following comments:

- The original source of private title for the subject parcel is derived through Land Commission Award 10806 pursuant to the Act of 1850, which is currently codified as Chapter 7, Hawaii Revised Statutes and is sometimes referred to as the Kuleana law.
- Fee simple owners of Chapter 7 lands "have a right to drinking water, and running water, and the right of way. The springs of water, running water, and roads shall be free to all, on all lands granted in fee simple."
- The subject parcel's boundary is the centerline of Niulii Stream from which the applicant intends to divert water to taro loi located on the subject parcel. The subject stream alteration and diversion does not affect State land, and the subject land's right to free water is by mandate of law. Accordingly, no permits are required by the Land Division.

Hawaii County Planning Department had no objections to the project and noted that the project is not in a Special Management Area (SMA).

The Engineering Division commented that the project site is located in Flood Zone X according to the Flood Insurance Rate Map (FIRM). The National Flood Insurance Program (NFIP) does not have any regulations for developments within Flood Zone X.

The Historic Preservation Division determined that no historic properties will be affected by the project because intensive cultivation has altered the land.

The Department of Hawaiian Home Lands, Forestry and Wildlife, and State Parks had no objections to the project.

The U.S. Army Corps of Engineers, U.S. Fish and Wildlife Service, Department of Health Clean Water Branch, Division of Aquatic Resources University of Hawaii Environment Center did not submit comments as of the date of preparation of this submittal.

#### Commission Staff Review

In 1989 the applicant filed a Registration of Stream Diversion Works and Declaration of Water Use for Waikane (Niulii) Stream to irrigate 1.6 acres (actually 0.5 acres according to the TMK) of taro via a rock and dirt auwai that was over 100 years old according to the applicant. About 60 feet of the auwai that the applicant had been using was destroyed and washed away by a flash flood in January 2008.

The applicant installed approximately 60 feet of four-inch diameter PVC pipe along the former auwai to continue to provide water to his five active taro loi. Hawaii Administrative Rules (HAR) Chapter 13-169-55 allows emergency work including the repair or restoration of structures damaged by a sudden or unforeseen event to proceed without a permit. Staff considers the applicant's actions as emergency work, and the Commission's Administrative and Civil Penalty Guidelines (G01-01) do not apply. The after-the-fact permit serves to verify the emergency nature of the work, and to document the actual work done.

The tax map for the area indicates that several parcels have Land Commission Award (LCA) numbers suggesting that these parcels may have appurtenant water rights, i.e. rights to use water by parcels of land at the time of their conversion into fee simple lands (Kuleana Act of 1850). The applicant stated that his family had been raising taro for generations on his family's one-half acre site.

The applicant's parcel is located adjacent to Niulii Stream and has riparian rights to the stream. Riparian rights are rights attached to land adjoining natural watercourses, to use the water on the riparian land. The use must be reasonable, and the reasonable use cannot harm the reasonable use of those waters by other riparian landowners. Niulii Stream is not located in a Commission-designated surface water management area.

The amount of water that the applicant is presently diverting via the four-inch diameter PVC pipe is much less than the amount of water that he was diverting previously via the 2 ½ feet wide auwai with six inches of water that was destroyed. A Petition to Amend the Interim Instream Flow Standard is not required because the applicant is diverting less water via the four-inch diameter PVC pipe than the amount of water that he was diverting previously via the auwai. The applicant is entitled to a reasonable amount of water diverted from Niulii Stream based on the applicant's riparian rights to Niulii Stream.

#### RECOMMENDATION:

That the Commission:

1. Approve an After-the-Fact Stream Diversion Works Permit for a four-inch diameter PVC pipe to replace a storm-damaged auwai in Niulii Stream, North Kohala, Hawaii, TMK:

(3) 5-2-008:001. The permit shall be subject to the Commission's Standard Conditions in Exhibit 5 (Standard Conditions 4 to 8 do not apply to this permit).

2. Allow the applicant to divert water from Niulii Stream via a four-inch diameter PVC pipe for irrigation purposes. The interim instream flow standard for Niulii Stream does not need to be amended because the applicant is diverting less water presently via the four-inch diameter pipe from Niulii Stream than via the auwai previously.

Respectfully submitted,



KEN C. KAWAHARA, P.E.  
Deputy Director

- Exhibits:
1. Location Maps 1a and 1b
  2. TMK Map
  3. Diagram of taro loi
  4. Photos PVC pipe diversion
  5. Standard Stream Diversion Works Permit Conditions

APPROVED FOR SUBMITTAL:



LAURA H. THIELEN  
Chairperson



Department of Land and Natural Resources  
Commission on Water Resource Management  
Stream Protection and Management Branch

## ISLAND OF HAWAII

### Streams

- Ephemeral
- - - - - Intermittent
- Perennial

\* TMK:  
(3) 5-2-008:001

This map was produced by the Department of Land and Natural Resources (DLNR), Commission on Water Resource Management for planning purposes. It should not be used for boundary interpretations or other spatial analysis beyond the limitations of the data. Information regarding compilation dates and accuracy of the data presented can be obtained from DLNR.

Datum: North American Datum 1983

Tax Map Key (TMK) layer is comprised of tax assessor parcels derived from paper plat maps with attributes from public tax assessor records and is updated by each respective county.





Department of Land and Natural Resources  
Commission on Water Resource Management  
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### Diversions

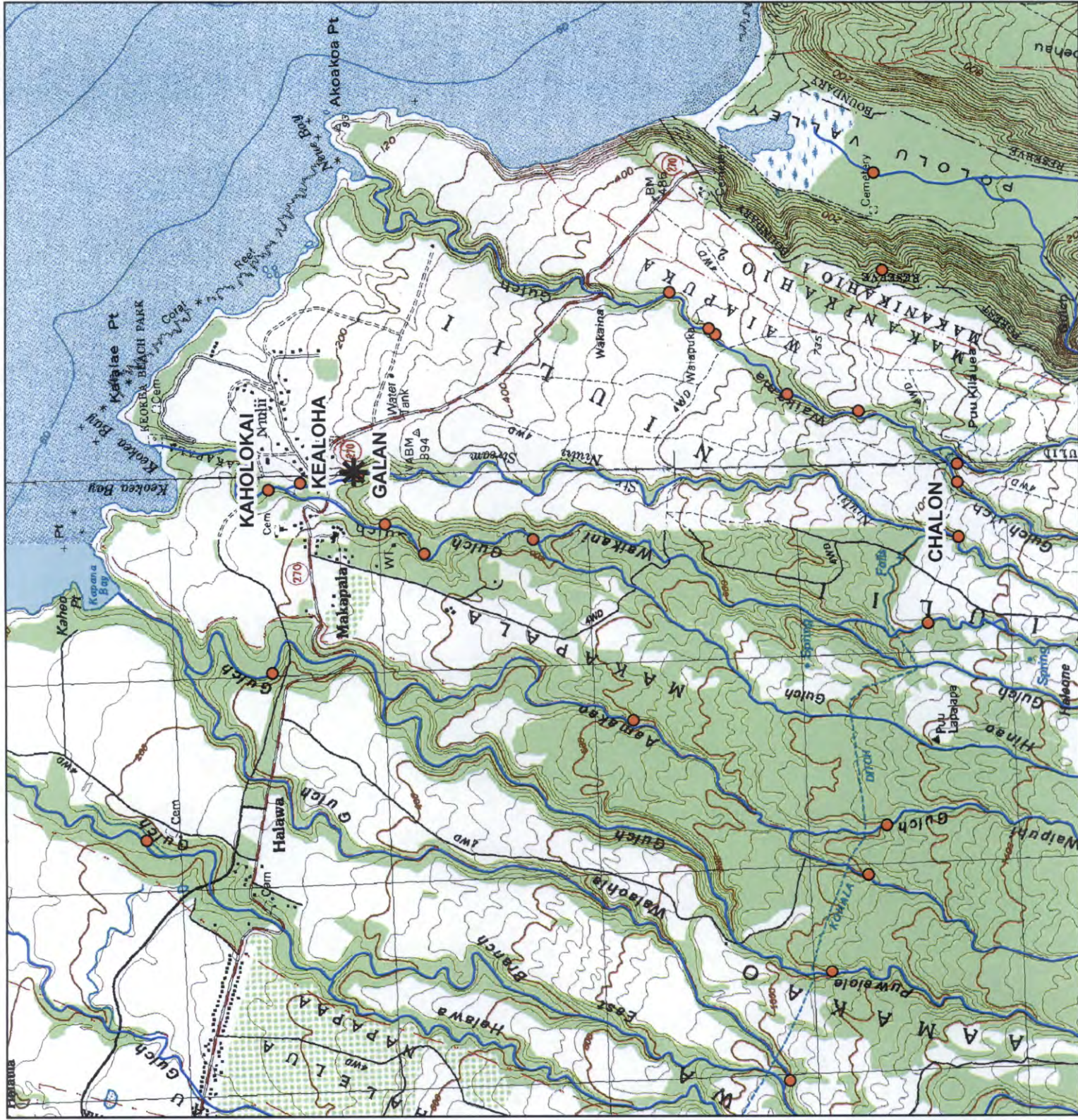
- Diversions

\*  
TMK:  
(3) 5-2-008:001

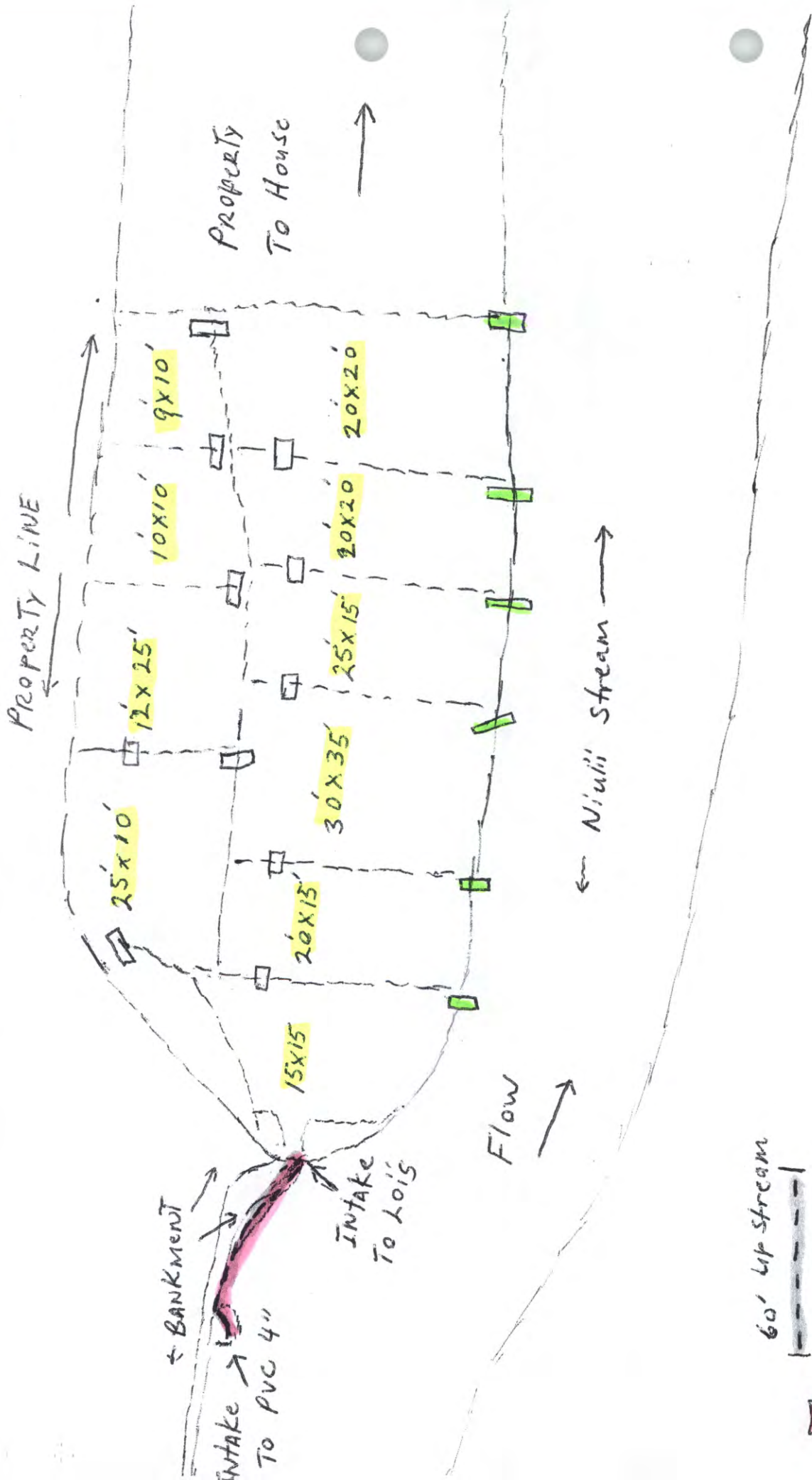
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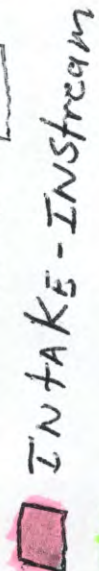
60' Upstream



PIPE LINE PVC 4" Old AUWA: AREA DESTROYED.



Old Lois 1/4 Acre



INTAKE-INstream



OUTLETS BACK to streams



INLETS Flows to NEXT Lois

DIAGRAM



Taro patches area.



Intake instream.



Pipeline back to lois.



Outlet back to stream.



Water outlet back to stream.

STANDARD STREAM DIVERSION WORKS PERMIT CONDITIONS  
(Revised 9/19/07)

1. The permit application and staff submittal approved by the Commission at its meeting on July 16, 2008, shall be incorporated herein by reference.
2. The applicant shall comply with all other applicable statutes, ordinances, and regulations of the Federal, State and county governments.
3. The applicant, his successors, assigns, officers, employees, contractors, agents, and representatives, shall indemnify, defend, and hold the State of Hawaii harmless from and against any claim or demand for loss, liability, or damage including claims for property damage, personal injury, or death arising out of any act or omission of the applicant or his successors, assigns, officers, employees, contractors, and agents under this permit or related to the granting of this permit.
4. The applicant shall notify the Commission, by letter, of the actual dates of project initiation and completion. The applicant shall submit a set of as-built plans and photos of the completed work to the Commission upon completion of this project. This permit may be revoked if work is not started within six (6) months after the date of approval or if work is suspended or abandoned for six (6) months, unless otherwise specified. The proposed work under this stream channel alteration permit shall be completed within two (2) years from the date of permit approval, unless otherwise specified. The permit may be extended by the Commission upon showing of good cause and good-faith performance. A request to extend the permit shall be submitted to the Commission no later than three (3) months prior to the date the permit expires. If the commencement or completion date is not met, the Commission may revoke the permit after giving the permittee notice of the proposed action and an opportunity to be heard.
5. Before proceeding with any work authorized by the Commission, the applicant shall submit one set of construction plans and specifications to determine consistency with the conditions of the permit and the declarations set forth in the permit application.
6. *The applicant shall develop site-specific, construction best management practices (BMPs) that are designed, implemented, operated, and maintained by the applicant and its contractor to properly isolate and confine construction activities and to contain and prevent any potential pollutant(s) discharges from adversely impacting state waters. BMPs shall control erosion and dust during construction and schedule construction activities during periods of low stream flow.*
7. *The applicant shall protect and preserve the natural character of the stream bank and stream bed to the greatest extent possible. The applicant shall plant or cover lands denuded of vegetation as quickly as possible to prevent erosion and use native plant species common to riparian environments to improve the habitat quality of the stream environment.*
8. In the event that subsurface cultural remains such as artifacts, burials or deposits of shells or charcoal are encountered during excavation work, the applicant shall stop work in the area of the find and contact the Department's Historic Preservation Division immediately. Work may commence only after written concurrence by the State Historic Preservation Division.